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# A DEFENSE OF THE CONSTITUTION

BY DAVID JAYNE HILL

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IN the last three years there have been proposed in Congress ninety-nine amendments to the National Constitution, involving twenty-seven different subjects. Some of these may not be altogether unreasonable, but others are of a positively revolutionary character, which if adopted would completely change the nature of our Government. The amount of public attention given to these proposals in the press of the country is very slight. If mentioned at all, it is only in a casual manner, yet powerful influences are at work to procure the adoption of these changes. What is most alarming is that a general disposition exists to try political experiments, some of which might prove fatal to the existence of any fundamental law whatever. From places of the highest authority at Washington utterances are publicly made which not only disparage the Constitution of the United States as an archaic document, but set up the casual judgments of a mere majority of the voters, formed without serious discussion, as the ultimate standard of right and as the sole authority of law. In fact, for political purposes, wholly undefined conceptions of "humanity"—which has become a word to conjure with—are regarded as more valid than any laws; and the fundamental law in particular, which guarantees to every citizen a "due process of law," is held in slight esteem.

Underlying this movement of destructive criticism is a popular ignorance of what the Constitution really means for the common man. It is not realized by the average man that all he holds most dear is wrapped up in the doctrines of the Constitution, and that if it were swept away the palladium of his liberties would be destroyed. Trial by jury, religious liberty, the right of free speech and free assembly—all the personal immunities of free men are a part of its guaran-

tees. It has never been demonstrated that any defensible forward step toward social justice is prohibited by it, and most of the proposals for changing it turn out upon close examination to be the furnishing of means to destroy some form of personal liberty and to force upon others, either States or persons, some surrender of their present constitutional rights.

It is timely, therefore, to restate the philosophy on which the Constitution was founded. It was, in fact, the first attempt in history to lay the foundations of government in the deep setting of human rights. This the great empires and even the republics of the past had not even attempted to do. They were embodiments of predominant military force, the result of struggle on the field of battle; and all the so-called theories of the State were framed after the event, frequently with the purpose of imparting an appearance of reasonableness to a system that was, in effect, entirely the work of a dominating person or a dominating class.

To this there is one apparent exception—the English Revolution of 1688, with which the writings of John Locke are closely associated. But, in fact, Locke's "Treatise on Civil Government" was not published until 1690, after the reform of the English Constitution had been effected. It formulated after the fact the principles on which the English Revolution had proceeded, but it cannot be said to have produced the result, or in any way to have affected the actual form of the English Government.

Nor can it be said that any single writing determined the form of the American Governments, State or Federal. They grew quite naturally out of the conditions of the time; and yet there was in their formation a philosophy that is both coherent and original, the distinct product of reflective thought.

That which was really original in the American Constitutions, State and Federal, is not to be found in their mere machinery, but solely in the purposes they were intended to realize. There was nothing new in the fact that the Constitutions were written, for so were the royal charters of the Colonies; which probably suggested the idea of a written form of fundamental law. There was nothing new in Representative Government, which was an inheritance from the Saxon Witenagamot. There was nothing original in the division and distribution of public powers, the importance

of which Montesquieu had emphasized. Nor was there anything novel in the idea of a Bill of Rights, for similar guarantees had been secured in Magna Charta.

The one really original idea in the American Constitution was the conception of liberty as a strictly personal prerogative to be secured by a fundamental public law. I say as a *personal* prerogative, because liberty had previously been regarded as something belonging to the people in the mass, as a trophy extorted from royalty; but the American conception was that liberty is something inherent in each individual as a moral personality, and not a concession made to the people by a government.

This liberty of the individual, this inherent right of the person to exercise his faculties and obtain and enjoy the rewards of such exercise, this prerogative to be and to become all that Nature had provided that the individual is capable of becoming,—was to be protected by public law; which should, therefore, accord to every man the same security in the exercise and enjoyment of his powers of action.

If we ask what created this conception in the American mind, the answer is, I think, that it was the result of the effort to comprehend the nature of the State in the light of moral and religious convictions. If every human being is responsible for what he makes of his life, liberty is the necessary precondition of self-realization. From this point of view the Absolute State does violence to the most sacred principle of human nature. By subjecting the individual to external control beyond the necessities of social order it nullifies and extinguishes all the natural impulses and all the aspirations of personal development. Such a State could find in the intellectual and moral nature of man no reason for existence. On the contrary, it was regarded as a mere usurpation resting entirely upon external force.

A true State, then, must be an extension, and not a suppression, of liberty. It must be a friend and not an enemy to personal self-realization. It must be an affirmation and not a negation of the rights inherent in personality. The purpose of government, the men of the Revolution thought, was not to repress but to elicit the powers of the individual by creating the conditions for their peaceful and profitable activity. In effect, government, in this conception of it, could be nothing else than the legal organization of liberty. Laws

there must be, yet there must be a limit to lawmaking. Liberty demanded conditions of personal activity, while government from its very nature imposed restrictions upon personal action. The real problem was to reconcile government with liberty by the enactment of just and equal laws, at the same time prohibiting the enactment of laws that were not just and equal. What the Revolutionary Fathers held to be most fundamental was the idea that there exists nowhere in human society an unlimited and absolute authority. They did not accept it as possessed by others, nor did they claim it for themselves. They denied that it inhered in the Crown or in the Parliament. In truth, they could not admit that it existed anywhere. No majority could ever rightfully suppress the liberty of a minority; and while the power to do so might be possessed and exercised, even the whole people possessed no such authority. It was precisely that notion of unlimited authority against which they were in rebellion. To them mere power did not confer authority.

It is a noteworthy fact that the word "Sovereignty," which has given rise to so much controversy, is not contained in the Declaration of Independence. It is not there in any way referred to as the foundation of government. The doctrine set forth in the Declaration is not a doctrine of Sovereignty, but a repudiation of the common acceptance of it. The foundation of government there delineated is the personal possession of certain "unalienable Rights,"—to use the exact language employed,—“among which are Life, Liberty, and the pursuit of Happiness.” These Rights are not bestowed or in any sense derivative. They are inherent in personality as a free, self-conscious, and self-determining entity. The design of government is not to create or obtain them, but only to “secure” them; that is, to give them a social guarantee. It is for this purpose “that governments are instituted among men, deriving their just powers from the consent of the governed.” And in declaring the Colonies to be States, there is no assumption that they were Sovereign in the sense of possessing unlimited authority over the people, which no one even dreamed of at that time. All that was claimed for the liberated Colonies in the Declaration was that “they are, and of right ought to be, Free and Independent States.”

It is deserving of emphasis that the idea of Sovereignty—a law term then for more than two centuries in current

use to express what was esteemed the essence of the State—first emerges into use in our great public covenants only with the establishment of external relations between the separate Colonies or with foreign Powers. In the Articles of Confederation of 1781 it is said: “Each State retains its sovereignty, freedom, and independence.” The meaning here is that no central Power claiming sovereign authority in the absolute sense could be allowed to imperil local liberty. In the Constitution of the United States, however, the idea of Sovereignty is not thus brought forward and expressed in the instrument itself. In it “The People” “ordain and establish” a government of prescribed and limited powers for precisely defined purposes, all other rightful powers being reserved to the States or to the people.

It is of the highest importance to consider how, in these attempts to formulate the thought of the time, the word “Sovereignty” is intentionally avoided, until the fear had arisen that the People might be inadvertently creating a virtually Sovereign Power that would eventually destroy their liberty; and then to compare and contrast this earlier silence with the heated controversies of a later period over this word and the powers associated with it.

It may well be imagined that “Sovereignty,” so long regarded as an attribute of kings, was to the men of the American Revolution a hated word, which they did not care to apply to themselves, and finally resorted to only as a bar to an encroachment upon their rights and means of self-protection. If there was to be anywhere a claim to Sovereign Power, they preferred in 1781 to attribute it to the States rather than to the Confederation; but when in 1787 it came to the question of a closer union, rendered necessary to their prosperity, they proceeded in effect to set limits to it as an attribute of the States, and instead of speaking of “We the States” preferred the safer and yet more potent formula of “We the People.”

It was, however, only in a qualified sense that the men of the American Revolution accepted the doctrine of the “Sovereignty of the People” as laid down by Rousseau. He had simply transferred the idea of “supreme power” from the king to the people, still identifying supreme power with supreme authority. But the men of the American Revolution never imagined, as the men of the French Revo-

lution did, that the people, although they were the ultimate political authority, possessed unlimited authority to do, and to compel others to do, whatever might be their good pleasure. They esteemed themselves under a still higher authority, the authority of moral law. For what, in fact, were they attempting to do? They were engaged in establishing a government, which, they declared, was founded upon "unalienable Rights"; and it was from these rights, and not merely from "supreme power" that the authority of government was to be derived. How, then, could they claim an authority to override, or to ignore, these "unalienable Rights," which belonged to men as responsible moral beings; and how could they establish a government without restricting its powers in such a manner as to prevent its encroachment upon these "Rights"?

It was altogether a new philosophy of the State. It gave to government a human foundation instead of a merely dynamic foundation. Physical means might be necessary to the enforcement of law under any government, but this new type of government was not derived from physical force. It was not the embodiment of the arbitrary will of any number of men. Majorities, sometimes even pluralities, might prescribe the courses of action permitted under the Constitution, but the very idea of a constitution was so to limit the powers of government as to protect liberty; that is, to "secure" the rights of the individual. Of sovereignty, therefore, in the sense of absolute and unlimited authority, there is no trace either in the Declaration of Independence or in the Constitution of the United States.

The Declaration was, without doubt, the boldest and most radical expression of the power of the People ever made in the name of American citizenship. It is interesting, therefore, to note that, in enumerating what these "Free and Independent States" might do, after affirming their power "to levy War, conclude Peace, contract Alliances, and establish Commerce," it was added restrictively, "and to do all other Acts and Things which Independent States *may of right do.*"

Here is no pretense that governments may assume absolute powers. Even in their external relations, they must be governed by the rule of right; and this is not a self-willed rule, but a body of principles derived from reason, with full respect to the equitable claims of liberty.

When, therefore, in 1787, it came to the drafting of the Constitution of the United States, the political philosophy that was embodied in it was not only unique but in contradiction with the practices of Absolutism. Instead of producing a covenant which accorded rights to the People, as the royal charters had done, the People accorded rights to the Government they intended to create, and these were explicitly enumerated and precisely defined. The procedure was a complete reversal of the ordinary method of constituting a government. Hitherto, kings and emperors had granted "rights and liberties" in royal and imperial charters, sometimes bought with tribute and sometimes extorted from them by force of arms. This time it was "The People," already claiming possession of complete liberty as an inherent attribute of personality, that prescribed and limited the powers of government. Henceforth, government was to exist for the protection of liberty. It was a new procedure in an age given over to Absolutism. Europe, startled, opened its eyes with astonishment. It was the beginning of a movement destined to envelop and transform the world. Here was a conception fertile in possibilities, for it pointed the way to the perfection of national existence and the development of peaceful international understandings by resting the whole framework of civilization upon the dignity of the human individual as a free and responsible being.

## II

The American solution of the problem of reconciling government with liberty consisted in the acceptance of four fundamental ideas, which constitute the corner-stones of the structure which we now call our National Constitution.

These four corner-stones of American Constitutionalism are:

1. Representative Government;
2. Division of Public Powers;
3. Guarantee of Personal Immunities; and,
4. Judicial Protection of Constitutional Guarantees.

What gives special interest to the consideration of these four fundamental ideas at this time is that every one of them is now hotly assailed as an obstacle to social justice and to that progress which the present and coming generations



ought to desire and make possible. This attack upon our existing institutions, and especially upon the Constitution of the United States, although made in the name of "progress," does not proceed from any coherent conception of the true nature of the State, and it offers no new foundation principle upon which such a conception could be erected. It cannot, therefore, be dignified with the name of a new philosophy. It is, in fact, a protest against principles of any kind; and would make of Law an instrument of expropriation in the interest of predominant desires. Against Representative Government it pleads for Direct Popular Action. Against Division of Public Powers it demands predominating Executive Authority to sweep away the system of checks and balances, in order promptly, without discussion, to realize what is believed to be the popular will. Against the Guarantee of Personal Immunities, it claims the superiority of the will of the majority to which there is no limit. Against Judicial Protection of Constitutional Guarantees it sets up the judgment of the mass. Against all of these constitutional ideas taken together, it opposes the immediate decision of the moment. It would sweep away all barriers to change and leave the whole social structure to the unlimited power of a majority of the voters.

The devices to be substituted for constitutional limitations are the initiative and referendum, to be employed upon all subjects without distinction; the reinforcement of executive authority, in order to procure prompt action; the elimination of constitutional guarantees, such as the prohibition of taking away property without "due process of law"; the popular recall of judges, or of judicial decisions; and the affirmation of majority judgments in matters of law. Finally, the amendment of the amending clause of the Constitution, in such a way as to secure the easy alteration of the fundamental law, to the end that no court shall be able to declare any act of legislation unconstitutional. In short, the aim is, in effect, to destroy constitutionalism altogether by effacing the difference between a fundamental law and any ordinary statute.

It hardly needs to be pointed out that this is a complete repudiation not only of the philosophy by which the Constitution of the United States has been framed, but of the whole conception of a fundamental law. It is a scheme for a radical revolution in our form of government.

Claiming to be prōgressive, this scheme of government is in no sense constructive, but totally destructive. It lays down no principles whatever. It presents no vision of what the State would ultimately be, or of what it is desired that it should be. It offers no guide to indicate to us what it might, if these doctrines were accepted, ultimately become. The only prospect it opens before us is a pathway to complete State omnipotence—the entire effacement of the individual, the creation of a mechanism of expropriation, the reign of sumptuary laws, the reduction of the citizen to a mere slave of the State.

But upon what ground can it be claimed that a majority of theoretically co-equal citizens—or even a minority, where there are several parties of which only *one* controls the government—is entitled to absolute dictation regarding the life and property of the community? And how very real this subjection might become is evident from the revolution already accomplished by the Sixteenth Amendment to the Constitution, which empowers the Congress of the United States “to lay and collect taxes on incomes from whatever source derived without apportionment among the several States and without regard to any census or enumeration.” Here Congress is already absolute sovereign. It may increase the tax and change the exemption from it in any way it pleases, even to the limit of confiscation. By this means the State may become the owner of all the property of the people and the sole dispenser of the means of livelihood.

The example cited is only an illustration, and it is not here intended to present any argument against a reasonable income tax. But it may serve to remind us how easily, in the silence of the night as it were, almost without our observation, if once we begin a series of changes in our fundamental law, the whole spirit of our free institutions may suddenly vanish away.

But the thought I would emphasize is, that the liberty we have loved and cherished is forever in danger; and that we cannot hope to retain it for ourselves and our posterity without regarding our fundamental law. A State that is not based upon defensible general principles is built upon the sand.

DAVID JAYNE HILL.